No. 222.

Brief of Cleveland for D. C

Filed Jan. 26, 1899.

Supreme Court of the United States.

OCTOBER TERM,
No. 222.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

JOHN HENRY CLAYTON ET AL.,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

TREADWELL CLEVELAND,
Counsel for Defendants in Error.

Supreme Court of the United States.

THE TEXAS AND PACIFIC RAILWAY COMPANY, *Plaintiff in Error,* *vs.* JOHN HENRY CLAYTON, NICHOLAS ROBERTS and CHARLES ANDERSON EARLE, *Defendants in Error.*	October Term, 1898. No. 222.

In error to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF IN BEHALF OF DEFENDANTS IN ERROR.

Statement.

This action is one of many brought by different shippers against the Texas and Pacific Railway Company to recover the value of cotton delivered to the said railway company as a common carrier, and destroyed while in its possession by the burning of the wharves of the said company at Westwego, La., a point on its line of road, on November 12, 1894.

This action concerns the destruction of only four hundred and sixty-seven bales of cotton. Over 22,000 bales in all were burned.

A plea was interposed on the ground that the Circuit Court had no jurisdiction, the defendant alleging that it was not a resident of the Southern Dis-

trict of New York. This plea was overruled on the authority of *Interstate Commerce Commission* vs. *Texas and Pacific Railway Company*, 20 U. S. Appeals, 1, and the question was finally determined by this Court in favor of the jurisdiction in *Texas and Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S., 197.

The testimony in the record relating to this question of jurisdiction may, therefore, be disregarded.

The statements of facts contained under various heads and in several places in the brief for the plaintiff in error require correction and supplement.

The four bills of lading upon which the action is brought make no mention of fire, and they are singularly free from clauses limiting the liability of the common carrier by rail. They contain, however, the following significant clauses, under which, when supplemented by the proof, the Circuit Court directed a verdict for the shippers and the Circuit Court of Appeals affirmed the judgment:

> "Received by the Texas & Pacific Railway * * * for delivery to shippers' order or their assigns at Liverpool, England, * * * from Bonham, Texas, to Liverpool, England. Route via New Orleans & Elder & Dempster Steamship line."
>
> * * * * * * *

"Upon the following terms and conditions, which are fully assented to and accepted by the owner:

> "That the liability of the Texas and Pacific Railway Company in respect to said cotton and under this contract is limited to its own line of railway, *and will cease, and its part of this contract be fully performed upon delivery of said cotton to its next connecting carrier; and in case of any loss, detriment or damage done to or sustained by said cotton before its arrival and delivery at its final destination, whereby any legal liability is incurred by any carrier*, THAT CARRIER ALONE SHALL BE HELD LIABLE THEREFOR IN WHOSE

ACTUAL CUSTODY THE COTTON SHALL BE AT THE TIME OF SUCH DAMAGE, DETRIMENT OR LOSS."

"*That the said cotton shall be transported from the port of New Orleans to the port of Liverpool, England, by the Elder, Dempster & Co. Steamship Line, with liberty to ship by any other steamship or steamship line; and upon delivery of said cotton to said ocean carrier at the aforesaid port this contract is accomplished, and thereupon and thereafter the said cotton shall be subject to all the terms and conditions expressed in the bills of lading and master's receipt in use by the steamship or steamship company,*" &c. (p, 91, 92).

It appears from the evidence that the line of the Texas and Pacific Railway Company terminates in the City of New Orleans, where it had warehouses and yards (pp. 31, 32).

Westwego, of which there is no mention in the contracts sued on, is in the Parish of Jefferson (p. 75), and is a branch terminal or station opposite to but not in either the city or the port of New Orleans. It consisted only of the Railroad terminal, a wharf with tracks, an office and sheds on it. The cotton involved in this suit was unloaded on the wharf at Westwego on various dates from October 22 to November 4, 1894, and was burned there on November 12, 1894.

Each of the bills of lading contains the following: "T. & P. Contract No. 44" (p. 92, &c.). There is no proof whatever that the shippers knew what this Contract No. 44 was. It is in fact a contract in writing between the Railway Company and the Elder Dempster Company, and is dated September 29, 1894. Its material particulars are:

> "Messrs. Elder Dempster & Company S.S. Line:
>
> "I have this day engaged 20,000 bales cotton for shipment by the Elder Dempster Company's S. S. line for Liverpool, England, at 49.21 per 100 pounds compressed cotton, delivery during months October, November and December, 1894, as per condition on the

reverse side of this contract. P. pro. Elder Dempster & Company, by M. & R. Warriner. Yours respectfully, C. G. Miller, Agent T. & P. Railway Co." (p. 46).

There are no conditions on the reverse side of the contract affecting any of the questions at issue herein.

There is no mention of Westwego in this contract, nor is there any testimony tending to show that the steamship company ever agreed with the railway company to send ships for the cotton to Westwego at any particular time during the months of October, November and December, 1894, or to receive at Westwego any particular lot of cotton at any definite time in those months or in any named vessel. Nor is there any testimony tending to show that the railway company considered that the steamship company was bound to send vessels for the cotton at any particular time or for any particular lot of cotton.

The conceded course of business between the carriers, of which however, the shipper had no knowledge, is substantially correctly stated in the brief for the appellants.

It must be noted however, that in none of the documents passing between the Railway Company and the Steamship Company is there any clause which is claimed by the appellant to show that the cotton was considered as delivered by the Railway Company to the Steamship Company. On the contrary, these papers clearly show that the Railway Company simply notified the Steamship Company that such cotton as was described in what are called the "transfers" was at the wharf consigned to the Steamship Company, and that the Steamship Company requested the Railway Company *to deliver* the described cotton to such and such a steamship on her arrival at the dock of the Railway Company.

It is a vital fact to be borne in mind throughout this controversy that the wharf of the Railway

Company was in no respect whatever under the control or management of the Steamship Company. The Railway Company employed the watchman clerks and the custodians of the dock (p. 78), and the statements which are to be found throughout the brief for the appellants, "that for purposes of shipment by Elder, Dempster & Company, the dock was in the control of their employees" or "that a part of the contract was the control of the dock by Elder, Dempster & Company, so far as the same was necessary for the loading upon their vessels," have no foundation whatever in the evidence. On the contrary, on page 38 of the appellant's brief there should be added the following to the cross-examination of Wilkinson:

> "I was the clerk in charge of the dock. I don't know whether I would have allowed a person to land unless he had permission of the Railway Company or not. It all depends on circumstances. He might explain what he was there for. He would have to explain what he was there for in order to get on the dock, and that explanation would have to be satisfactory to me" (Record, p. 78).

Miller, local freight agent, testified, page 33, in describing the persons who had charge of the dock at Westwego:

> "The persons who were immediately under me at Westwego at that time were Mr. A. L. Wilkinson, who was my chief clerk. * * * There were the Boylan watchmen, one by the name of Peake, one named Robau, and one named Schoen; there was a private watchman by the name of Schurb, either a private or Boylan watchman; a private watchman by the name of Valle. Those are not all, but all that I can recall at this time at Westwego, aside from the laborers (p. 33). * * * In November, 1895, the Railway Company had regularly employed at Westwego one day watchman, a private watchman, not far from the Boylan office, and one at night; the name of the day watchman employed at the time of the

> fire was Schurb. The name of the night watchman was Valle. The main man in charge of the clerical force at Weswego was Mr. Wilkinson. * * * The person in charge of the wharf for the Railway Company was the chief clerk, Mr. Wilkinson, so far as the party located permanently was concerned."

No person could come on the dock without the permission of the Railway Company. It was a private dock, and necessarily in control of its owner. The Railway Company conducted there a very large business, not only as to cotton, but as to other classes of goods brought there by its railroad to be delivered by it to many different steamship lines and ships. If any cotton or other goods had been stolen from the dock the loss would have fallen, not upon the Steamship Company, who had no employees there or any voice in the management of the dock, but would have been the loss of the Railway Company.

It must further be noted that there is nothing whatever in the contract, No. 44, which is the only contract which is made a part of the bill of lading, concerning Westwego.

Most of the testimony herein on behalf of the shippers and much on behalf of the Railway Company was taken in New Orleans prior to the trial. Upon the trial, however, Mr. Sargent was called by the Railway Company and testified (p. 83):

> "We offered him (Mr. Warriner) a certain figure for the transportation of twenty thousand bales of cotton, to be received by him at Westwego and delivered at Liverpool."

This was on the 27th of September.

Whatever such conversation was, the contract was reduced to writing on the 29th of September, and that contract makes no mention of Westwego, and the contract itself contains nothing in relation to

deliveries, with the exception that they should be made during October, November and December.

Mr. Pearsall was called on the trial, and stated (p. 81) an alleged conversation with Mr. Warriner, as having taken place on November 12, the day of the fire, in which he says:

> "They were requested to make every effort to move the cotton at the earliest possible moment and to comply with their contract. The exact words of their conversation I don't remember, but the sense of it was that their ships had met with great delays in New Orleans on account of the labor troubles they had, and at that time there was considerable trouble between the steamship agents and the cotton screw men; they were on a strike, the screw men, and they gave that as an excuse for not carrying out their contract of removing the cotton. That is about the sense of it, I don't remember the exact words."

This conversation, testified to when it is impossible to contradict it, does not in any way refer to any specific lot of cotton. The only contract which Elder, Dempster & Company had with the Railway Company, so far as the cotton in suit is concerned, is contract No. 44, and that contract, as we have seen, refers to deliveries during October, November and December. Whatever other contracts there may have been, if any, obliging Elder, Dempster & Company to remove any other cotton at any particular time does not appear, but it is strange that such a conversation could have taken place in view of the facts proved by Mr. Miller in relation to the loading of vessels at Westwego during the week prior to the fire.

This testimony shows conclusively (pp. 40-41) that there were only two cotton wharves or berths at the dock at Westwego, and that those cotton berths were each of them continuously occupied by other steamships loading cotton and other goods from the 5th to the 12th of November (p. 41). If Mr. Warriner did, in fact, make any excuse for not complying

with a contract, such conversation must have alluded to some other contract than contract No. 44.

There is no testimony whatever tending in any way to show that the railway company did not, as far as the cotton in this suit is concerned, acquiesce in any delay that might arise through the late arrival of vessels either at New Orleans or at Westwego, or that the Railway Company ever considered its part of the transportation terminated before the actual arrival of the steamship at Westwego, and the delivery to it through master's or mate's receipts then given, of the cotton designated for that particular vessel, or ever considered itself in any way a warehouseman, or that at any time the Railway Company considered that its duty was performed until after the arrival of the steamship at the dock at Westwego and the designation by the employees of the Railway Company of the cotton which the agents of the Steamship Company were then, and then only, for the first time ready to receive and care for. All the documents, as I have said, speak not of delivery made to the Steamship Company prior to the arrival of the steamship at the dock, but only of the readiness of the Railway Company to deliver to the steamship upon such arrival. The earliest moment when any employee of the Steamship Company was informed of the location of any lot of cotton on the wharf, was after the arrival at the dock of the vessel which was to take such cotton. The lots of cotton were then pointed out to the mate by the employees of the Railroad Company.

The fire took place before the arrival at the dock of any vessel which was to take this particular lot of cotton.

That the cotton in question was in the actual custody of the Railway Company at the time of its destruction must, it would seem, be conceded. It was on the dock owned exclusively by the Railway Company. That company's employees, and they only, cared for it, watched it, piled it and repiled it. It is

not even alleged that any of the cotton in suit was ever even seen by any of the employes of the Steamship Company.

There is no pretense of notification by the Railway Company to the Steamship Company that the latter was negligently delaying its receipt of this cotton, or that it was not performing its part of the agreement in respect to this cotton; in fact, no notice of the arrival at Westwego of any of the cotton in suit was ever sent to the Steamship Company until November 2, 1894, and no notice was ever sent of its arrival at New Orleans.

Although part of the cotton was unloaded as early as October 22, no notice whatever concerning it was sent by the Railway Company to the Steamship Company until November 2; some notices were sent as late as November 9, and for 100 bales no notice at all was sent.

At page 20 of the opposing brief it is stated that this cotton was, some time before the fire, in position ready to be taken by the Steamship Company from the place on the wharf where it had been unloaded. It does not appear from the evidence at what particular place on the dock this cotton was, and Mr. Miller has testified that when cotton was not in a position where it was accessible to the Steamship Company to take, it was the duty of the Railway Company to move it to a convenient place (p. 50), and cotton was constantly being moved, piled up closer and higher.

However much the Railway Company might have been inconvenienced by the arrival of so large a quantity of cotton at its terminal, the Steamship Company was under no contract obligation to take delivery except during the months of October, November and December. In addition to this, as we have seen, for the whole period between the notification of the arrival of this cotton in suit and the fire, all the dock room on the wharf at West Wego was occupied by vessels of the Elder, Dempster and other lines receiving cotton and other goods.

The legal questions to be determined upon this appeal are dependent upon the construction of written contracts and the force of uncontradicted testimony. They arise between the shipper and the initial common carrier and not between connecting carriers, and the essential facts are, as we have seen, few in number.

The following legal propositions are advanced by the appellant:

1. The cotton was actually delivered by the Railway Company to the Steamship Company.

2. If not actually delivered, it was constructively delivered by the Railway Company to the Steamship Company.

3. If not actually or constructively delivered to the Steamship Company by the Railway Company, the cotton was in the actual custody of the Steamship Company.

4. If not in the actual custody of the Steamship Company, but in the actual custody of the Railway Company, such custody by the Railway Company was not that of carrier but of warehouseman only, and no negligence being shown the shipper cannot recover.

First Point.

The Circuit Court properly denied the motion for a direction of a verdict in its favor made at the trial by the Railway Company, when the plaintiff rested.

The motion was made on the alleged ground that there was a failure of proof in two respects:

First.—That the complaint was wholly unproved in its entire *scope and meaning.* That there was

not a variance but an entire failure of proof of the cause of action alleged in the complaint.

SECOND.—That the allegations of the complaint were that bales of cotton were on or about the 12th day of November, 1894, wholly destroyed by fire at Westwego, Louisiana, at which time and place the same were in the possession of the Railway Company in the course of such carriage and as a common carrier; the answer admitting that the said cotton was destroyed at Westwego, Louisiana, aforesaid, denies each and every other allegation respecting the possession of said cotton; and that there was no proof of any of the allegations of the complaint in this regard (pp. 23, 24).

There was not an entire failure of proof. The complaint was proved in its entire scope and meaning.

The shippers, by the production of the bills of lading, proved that in the month of October, 1894, they delivered the cotton specified in the complaint to the Railway Company as a common carrier, and that it received the same and undertook and agreed, as a common carrier, to carry the same safely and securely from the place of shipment to Liverpool, England, by way of New Orleans, and thence to Liverpool, England, by the Elder, Dempster & Co. line of steamships, and there deliver the same to them. By these it appears that the Railway Company receipted for the cotton for delivery to shippers' order or assigns at Liverpool, England, and that the cotton was to be carried "From Bonham, Texas, to Liverpool, Eng. Route, via New Orleans and Elder & Dempster Steamship Line."

The contention of the Railway Company that the shippers having alleged a common law contract of carriage and proved one with certain restrictions or limitations, the complaint remained unproved "*in its entire scope and meaning*," is wholly with-

out foundation, as a reference to the following cases, if cases be needed, shows:

Dunn *vs.* Durant, 9 Daly, 389.
Catlin *vs.* Gunter, 11 N. Y., 373.
Place *vs.* Minster, 65 N. Y., 89.
Richards *vs.* Westcott, 2 Bosw., 589.
Bonsteel *vs.* Vanderbilt, 21 Barb., 26.

Second Point.

The Circuit Court below did not err in refusing to direct a verdict for the Railway Company at the conclusion of the testimony, on the ground that the testimony showed that there had been a delivery of the cotton sued for to the connecting carrier, the Elder, Dempster & Company line of steamers.

(1.) *There was no actual delivery of the cotton to the Elder, Dempster & Co. line of steamships.*

The cotton involved in the suit at bar was unloaded and notification of its arrival sent, as follows:

The 200 bales of cotton shipped on bill of lading No. 35 was unloaded at Westwego by the Railway Company between October 22d and 25th, 1894 (p. 107), but notice of its arrival was not sent to the steamship company till November 2, 1894 (p. 62).

The 100 bales of cotton shipped on bill of lading No. 29 was unloaded at Westwego on October 31, 1894 (p. 107), and notice of its arrival was sent November 2, 1894 (p. 62).

The 100 bales of cotton shipped on bill of lading No. 28 was unloaded on October 31, 1894, with the exception of 25 bales, which was unloaded on

November 4, 1894 (p. 107), and notice of its arrival was sent November 9, 1894 (p. 62).

It does not appear from the evidence that any notice was sent of the arrival of 100 bales of cotton shipped on bill of lading No. 61. That cotton arrived at Westwego on October 29, 1894, with the exception of 25 bales which arrived on November 2, 1894. It was unloaded on October 30th, 31st and November 1st and 4th, 1894 (p. 107).

It was the custom of the steamship company to return these so-called transfer slips to the railway company as soon as it was ready to take delivery, with the order to deliver to a specific steamship either at Westwego or about due there (p. 84).

These transfers did not indicate in any case where on the wharf at Westwego the particular lot of cotton there mentioned in fact was.

After the receipt from the steamship company of the so-called transfer slips with marks of lots of cotton on them, and after the arrival of the steamship at Westwego, if it were found necessary to get the cotton out, that is, to truck it from where it was originally stored on the wharf, out in front or near enough in front to enable the steamship people to get it without having to go around other piles of cotton, that work Mr. Miller says would be attended to by some of the employees at Westwego of the Railway Company. Such employees would locate and get it out (p. 50). It was understood that the Railway Company would get out cotton when necessary to do so (p. 50).

The receiving officer of the ship, after the cotton had been found and pointed out to him by the railway employees, counted the cotton and signed for it and delivered mate's receipts for it (p. 85). Mr. Miller admits that he does not know of any instance where a single bale of cotton was allowed to go aboard a steamship without a mate's receipt for it (p. 70).

For the purposes of this appeal it is not essential to consider whether the deposit of cotton at West-

wego, a place not within the port of New Orleans, and not mentioned in the bills of lading nor in contract No. 44, was or was not a violation of the contract of carriage. It is important, however, I venture to suggest, that this point should not be passed upon on this appeal, as it is directly involved in other pending suits brought by other shippers to recover loss suffered through this fire.

The argument contained in the brief for the appellants upon the question of the delivery of the cotton, is made without reference to the words in the bill of lading that that carrier alone should be liable for loss *in whose actual custody* the cotton was at the time of such loss. As was said by Judge Lacombe at Circuit, the word "delivery" has been the subject of very frequent contention; but the word "delivery" in these bills of lading must be construed in connection with the subsequent clause in relation to actual custody, and if there had been, as there was not, even a constructive change of the possession, and the cotton had remained as it did in the actual custody of the Railway Company, the Railway Company alone would have been liable by the plain terms of the contract.

The cases mainly relied upon by the Railway Company at the trial and in the court below and in this court in support of the claim of a delivery are *Pratt* vs. *Railway Company*, 95 U. S., 43, and two Connecticut cases cited in the Pratt case, viz., *Merriam* vs. *Hartford R. R. Co.*, 20 Conn., 354, and *Converse* vs. *N. & N. Y. Tr. Co.*, 33 Conn., 166.

No one of the cases cited under this head in the appellant's brief has any legal relevancy to the questions at issue here, for the reason that the facts are so entirely diverse, as appears by the statements of them contained in the appellant's brief.

In no one of these cases do the words "actual custody" appear in the contract sued on.

In the Pratt case the question was whether the

Grand Trunk Railway Company or the Michigan Central Railway Company was liable. The Court says:

"The Grand Trunk Railway Company is engaged as a common carrier of persons and property. This action seeks to recover damages for a violation of its duty in respect to certain merchandise shipped from Liverpool to St. Louis and carried over its road from Montreal to Detroit. The goods reached the City of Detroit on the 17th of October, 1865, and on the night of the 18th of the same month were destroyed by fire.

The defendant (the Grand Trunk Railway Company) claims to have made a complete delivery of the goods to the Michigan Central Railroad Company, a succeeding carrier, and thus to have discharged itself from liability before the occurrence of the fire. * * * The precise facts upon which the question here arises are as follows:

At the time the fire occurred the defendant had no freight room or depot at Detroit, except a single apartment in the freight depot of the Michigan Central Railroad Company. Said depot was a building several hundred feet in length and some three or four hundred feet in width, and was all under one roof.

It was divided into sections or apartments, without any partition wall between them. There was a railway track in the centre of the building, upon which cars were run into the building to be loaded with freight. The only use which the defendant had of said section was for the deposit of all goods and property which came over its road or was delivered for shipment over it. This section, in common with the rest of the building, was under the control and supervision of the Michigan Central Railroad Company, as hereinafter mentioned. The defendant employed in this section two men, who checked freight which came into it. All freight which came into the section was handled exclusively by the employees of the Michigan Central Railroad Company, for which, as well as for the use of said section, said defendant paid said company a fixed compensation per hundred-

weight. Goods which came into the section from defendant's road destined over the road of the Michigan Central Railroad Company, were at the time of unloading from defendant's cars, deposited by said employees of the Michigan Central Railroad Company in a certain place in said section, from which they were loaded into the cars of said latter company by said employees when they were ready to receive them; *and, after they were so placed, the defendant's employees did not further handle said goods.* Whenever the agent of the Michigan Central Railroad Company would see any goods deposited in the section of said freight building set apart for the use of the defendant, destined over the line of said Central Railroad, he would call upon the agent of the defendant in said freight building, and from a way-bill exhibited to him by said agent, he would take a list of said goods, and would then, also, for the first time, learn their ultimate place of destination, together with the amount of freight charges due thereon; that, from the information thus obtained from said way-bill in the hands of the defendant's agent, a way-bill would be made out by the Michigan Central Railroad Company for transportation of said goods over its line of railway, and not before.

These goods were, on the 17th of October, 1865, taken from the cars and deposited in the apartment of said building used as aforesaid by the defendant, in the place assigned as aforesaid for goods so destined.

At the time the goods in question were forwarded from Montreal, in accordance with the usage in such cases, a way-bill was then made out in duplicate, on which was entered a list of said goods, the names of the consignees, the place to which the goods were consigned, and the amount of charges against them from Liverpool to Detroit. One of these way-bills was given to the conductor who had charge of the train containing the goods, and the other was forwarded to the agent of the defendant in Detroit. On arrival of the goods at Detroit the conductor delivered his copy of said way-bill to the

checking clerk of defendant in said section, from which said clerk checked said goods from the cars into said section. It was the practice of the Michigan Central Railroad Company, before forwarding such goods, to take from said way-bill in the custody of said checking clerk, in the manner aforesaid, the place of destination and a list of said goods and the amount of accumulated charges, and to collect the same, together with its own charges, of the connecting carrier.

We are all of opinion that these acts constituted a complete delivery of the goods to the Michigan Central Company, by which the liability of the Grand Trunk Company was terminated.

1. They were placed within the control of the agents of the Michigan Company.

2. They were deposited by the one and received by the other for transportation, the deposit being an accessary merely to such transportation.

3. No further orders or directions from the Grand Trunk Company were expected by the receiving party. Except for the occurrence of the fire, the goods would have been loaded into the cars of the Michigan Central Company, and forwarded without further action of the Grand Trunk Company.

4. Under the arrangement between the parties, the presence of the goods in the precise locality agreed upon and the marks upon them "P. & F., St. Louis," were sufficient notice that they were there for transportation over the Michigan road towards the City of St. Louis, and such was the understanding of both parties."

The Pratt case held that there was a delivery of the goods *where one carrier had brought them into the freight station of the next connecting carrier and there deposited them in a section of the station set apart for the delivery of goods brought by the defendant for shipment over the line of such connecting carrier.* The freight station was owned and controlled by the Michigan Central Railroad Co., *the connecting carrier.* "The only use which the

defendant had of said section was for the deposit of all goods and property which came over its road or was delivered for shipment over it. This section, in common with the rest of the building, was under the control and supervision of the Michigan Central Railroad Company" (p. 44). The defendant, the first carrier, had only two men employed in the station whose duty it was to check freight as it came in. "All freight which came into the section was handled exclusively by the employees of the Michigan Central Railroad Company, for which, as well as for the use of said section, said defendant paid said company a fixed compensation." It also appears that the goods coming over the road of the Grand Trunk, the defendant, were unloaded and placed in the section by the Michigan Central Railroad Company, and were then loaded into its own cars by its own employees. *After the goods were brought in and unloaded the Grand Trunk representative "did not further handle said goods"* (pp. 44-45). The agent of the Michigan Central Railroad, whenever he saw goods being loaded by his employees in the section for the Grand Trunk, would go to the representative of the latter railway company and get a list of the goods with place of destination. From the information thus obtained, the Michigan Central agent would make out a bill for the goods (p. 45).

Then, substantially, all that the Grand Trunk employees did in connection with the goods was, while watching the loading of the same by the employees of the Michigan Central Railroad Company, to check them off with the way-bill. They did not move the goods or have any control over them. The Michigan Central could send the goods on when it chose. It did not need to apply to the Grand Trunk. It did not have to give a receipt for them. The goods were not pointed out. *In fact, the first carrier had no further control over the goods.*

But in the case at bar the facts are quite the reverse. In the first place the wharf was owned

and controlled by the Railway Company (pp. 31, 32). It employed the men at work on the wharf. No one could go on the wharf without the permission of the clerk in charge (p. 78). It unloaded the cotton when it chose to, one, two or seven or any number of days after its arrival at Westwego (p. 107). Its employees after unloading it placed it where they chose, in the sheds or on the open platform (pp. 76-77). They placed it where it could be easily obtained by the ship, if they chose, or where it could not be found except by search, and where they would have to move it again before delivering to the ship. The Railway Company employed the watchmen on the wharf (p. 33), and the wharf was in all respects in its sole charge.

No paper sent to the Steamship Company in any way indicated on what part of the dock the cotton to be shipped had been placed either originally or subsequently. Therefore, when the ship came for the cotton its employees knew nothing of the position of the cotton, and consequently the representative of the Railway Company was obliged to show the ship's representative the location of the lots of cotton to be thus delivered (p. 49), and if it was not convenient for the ship to take the cotton from where it happened to be, then the employees of the Railway Company had to remove it to a place where the ship's employees could get at it (p. 50). After the cotton had been counted over by the ship's representative, if the cotton was all there, he would then give a mate's receipt for it (p. 49); and not until then did it come into the custody and control of the ship. And then, and not till then, could the cotton in any sense have been considered actually or constructively delivered to the Steamship Company.

In short the decision in the Pratt case was expressly stated to rest upon a condition of facts quite the contrary to those in the case at bar, viz.: (1) The goods were within the control of the connecting carrier. (2) No further orders or directions were

expected from the first carrier, and had the fire not occurred the goods would have gone forward without further action on the part of the first carrier. (3) A precise locality had been agreed upon between the parties for a deiivery of the goods, at which place they went out of the control of the first carrier.

In the case at bar, *for the whole period after the cotton had been unloaded and until the actual delivery to the ship and the taking of receipts, the cotton was still absolutely under the direction and control of the Railway Company.* It could move it about anywhere it chose and as often as it chose. No precise location for the cotton had been agreed upon between the parties in the case at bar, as was the fact in the Pratt case, when the control of the first carrier should cease and that of the connecting carrier should begin. This did not happen in the case at bar until the cotton was actually pointed out, counted over and receipted for, and this was never done until the ship was at its berth and its representative on the wharf.

Another case relied upon by the Railway Company is that of *Converse* vs. *The Norwich and New York Transportation Company*, 33 Conn., 166.

In this case there is no clause relating to "actual custody."

There the goods were taken aboard the *City of Boston*, one of the steamboats of the defendants, and carried to New London and there landed and put into a depot building on the wharf during the night of Saturday, May 7, 1864, and there destroyed by fire on the afternoon of Sunday, May 8th.

It appears from the evidence that the goods in question were deposited by the defendants in the usual place of deposit for freight brought by them and destined for points on the line of the railroad; that the common course of business in regard to such freight was for the defendants' agents to make out a way-bill of the several articles brought on

each trip and hand it to the agents of the railroad at New London shortly after the arrival of the boat; that the latter loaded the freight on board their cars, taking it from the place where the defendants were accustomed to deposit it, and checked each article upon the way bill as it was taken up; and that if any article described in the way-bill was not found or was found in bad order, the defendants were accustomed and expected to look it up or put it in good condition.

The Court, in discussing the question of delivery, said:

> "The remaining question, namely, whether there was or was not a performance of the contract set up in the second count, and an actual delivery to and acceptance by the Northern road, so that the responsibility was shifted on to that corporation, is one we have deliberately considered, and feel constrained to decide in the affirmative.
>
> It must be conceded that the defendants had transported the wool to their terminus and carried and placed it in the common depot by the side of the railroad track, at a spot where they by usage were expected by the Northern road to place it, *and that no other or further act of carriage or actual manual possession* was or could be expected of them. And so it must be conceded that actual manual possession had not been taken by the Northern road, nor is there any direct evidence of an express agreement that the carriage to and placing at the side of the track in the depot should be deemed a delivery to the road. We have no difficulty in determining, indeed *we must hold that there was a mutual agreement or tacit understanding, equivalent to such an agreement, that the transportation company should place the through freight at that precise spot and that the Northern road should take it from thence at a time convenient to them.* The construction of the depot and uniform usages are conclusive of it. The depot was constructed with a platform by the side of the track for the reception of goods to be taken from or put into the cars, and on

that platform the railroad company in the first and every instance of delivery by them placed their freight, and the transportation company at their convenience took it away and carried it on board their boat. And so the transportation company in like manner in the first and every instance placed there the freight for the Northern road, and they at their convenience put it in their cars and took it away and the usage was precisely the same with the Worcester road. * * * The depot was not the joint depot of the two parties only or erected for that purpose only, but the joint depot of three, including the Worcester road and erected for and used by each, not only for the mutual delivery and reception of through freight, but independently in transacting their independent local business. * * * This depot was a wharf, covered and enclosed indeed, but still a wharf, the only one occupied by them. *Upon this wharf and into the enclosure the Northern road laid their track for the delivery and reception of freight to and from the transportation company. Both parties then contemplated a delivery and reception on this wharf and in this enclosure and obviously in the precise manner actually pursued.* * * * *It is clear then that both the transportation company and the Northern road contemplated that the placing of freight by either intended for the other upon that platform was all that either was to do by way of delivery of their freight to each other*" (pp. 180–183).

In the Converse case the wharf and depot buildings were the property of the railway company, the connecting carrier. The transportation company, the original carrier, paid an annual rental for the use of the wharf in connection with the connecting carrier and a third company. Each of these companies transacted on the wharf an independent local business, aside from that of the mutual transfer and delivery of through freight (p. 182).

The tracks of the connecting carrier were run up to and along the platform. When the goods in

question were unloaded by the original carrier upon the wharf, they were deposited in the usual place of deposit for freight brought by it and destined for points on the line of the connecting carrier. The course of business was for the agent of the original carrier soon after the arrival of the boat, to hand the way-bill to the agent of the connecting carrier. When goods were unloaded and the way-bill handed to the connecting carrier nothing further was required of the original carrier. The connecting carrier, when convenient to it, loaded the goods so deposited on to its cars from the precise spot where they had been deposited by the original carrier. That was the custom established between them.

A comparison of the facts in the *Converse* case with those in the case at bar shows them to be in marked contrast. The Connecticut Court stated that had there not been insuperable difficulties in the way it would have been very willing to hold that there had been *no delivery at all* and that there was a joint holding of the goods in deposit by mutual arrangement. These insuperable difficulties were, (1) the mutual agreement that the Transportation Company should place the goods at the precise spot where they were actually placed and that the connecting road should take them from that spot at its convenience; (2) the mutual contemplation of the parties that the goods should be delivered and received there in the manner actually pursued; (3) that all that was contemplated to make a delivery by one party to the other was the placing of the goods on the platform; (4) that no further act was expected of the Transportation Company than the deposit of the goods on the platform; (5) and, not least of all, that the Transportation Company had carried the goods to the end of its line.

Another case relied upon by the Railway Company is that of *Merriam* v. *Hartford & New Haven Railroad Company*, 20 Conn., 354.

This was an action on the case for negligence on the part of the defendants in the transportation

and delivery of certain goods belonging to the plaintiff. In this case, again, there are no clauses in the contract similar to those contained in the bills of lading under discussion.

The facts are stated in the opinion. The Court said:

> "The plaintiff claimed to have proved on the trial that the property to recover the value of which this action was brought was delivered by him to be transported by the defendants as common carriers in the City of New York to Meriden on a dock in said city, which was the private dock of the defendants and in their exclusive use, for the purpose of receiving property to be transported, and that it was delivered there in the usual and customary manner in which the defendants received property for transportation; and the Court charged the jury that such delivery at said dock was a good delivery to the defendants to render them liable for the loss of the property, although neither they nor their agents were otherwise notified of such delivery. The defendants insist that they were not chargeable for it unless they had express or actual notice of such delivery, and that the jury should have been so instructed * * * (p. 360).
>
> If they [the parties] agreed that the property may be deposited for transportation at any particular place without any express notice to the carrier, such deposit merely would be a sufficient delivery. So if in this case the defendants had not agreed to dispense with the express notice of the delivery of the property on their dock, actual notice thereof to them would have been necessary; but if there was such an agreement, the deposit of it there merely would amount to constructive notice to the defendants and would constitute an acceptance of it by them; and we have no doubt that the proof by the plaintiff of a constant and habitual practice and usage of the defendants to receive property at their dock for transportation in the manner in which it was deposited by the plaintiff, and without any special notice of such deposit, was competent

> and in this case, sufficient to show a public offer by the defendants to receive property for that purpose and in that mode, and that the delivery of it there accordingly by the plaintiff in pursuance of such offer should be deemed a compliance with it on his part, and so to constitute an agreement between the parties by the terms of which the property, if so deposited, should be considered as delivered to the defendants without any other notice. Such property and usages was tantamount to an open declaration, a public advertisement by the defendants, that such a delivery should of itself be deemed an acceptance of it by them for the purpose of transportation and to permit them to set up against those who had been thereby induced to omit it the formality of an express notice, which had thus been waived, would be sanctioning the greatest injustice and the most palpable fraud" (p. 361).

In the Merriam case the dock belonged to the carrier receiving the goods, *and so they came into its possession and control*, while in the case at bar the goods were still on the dock of the Railway Company, and absolutely under its control.

The Merriam case has no legal relation to the questions involved in the case at bar.

Another consideration seems absolutely conclusive of the claim of delivery. The Railway Company reserved the liberty to ship the cotton by *any other steamship or steamship line*, and further provided in the bills of lading that the contract should be accomplished only when the cotton had been delivered either to the Elder, Dempster Line, or some other line. Such delivery, it was provided, should be parting with the *actual custody* of the goods. The evidence is uncontradicted that the Railway Company had the actual custody of the cotton.

(2.) *There was no constructive delivery of the cotton by the Railway Company.*

There is no testimony on which to base a claim for constructive delivery excepting the sending of the

notices of the arrival of the cotton. Even if under other circumstances this could be considered a constructive delivery it cannot in the case at bar, for by the terms of the bills of lading the Railway Company is prevented from even claiming a constructive delivery. These bills provided that that carrier should be liable in whose *actual custody* the cotton should be at the time of loss.

The facts show, as we have seen, that the Railway Company had the actual custody.

As the Court at Circuit very properly said in directing a verdict for the shippers:

> " Under this particular contract, whatever the relations between the two carriers might be, whatever mutual rights or obligations might arise by reason of notices passing between them, as between the first carrier and the shipper, the contract of carriage and the liability as a common carrier could be terminated *only by the transfer of the actual custody* from the first carrier to the second carrier, or by some notice brought home to the shipper of a modification of the contract " (fols. 510-511).

And there is no evidence of any such notice to the shipper.

Third Point.

The Circuit Court did not err in refusing to direct a verdict for the Railway Company at the conclusion of the testimony upon the ground that the relation of that company to the shippers was that of warehouseman and not that of common carrier.

(1.) *The bills of lading, herein provided in express terms* that that *carrier* alone should be liable in whose actual custody the cotton was at the time of its loss.

(2.) *There is no pretense of any action of the Railway Company indicating an attempt to store the cotton, nor any pretense that the shipper of the goods was ever notified of any attempt of the carrier to store the cotton, or was informed in any respect of the progress of the contract or the treatment by the Railway Company of the cotton.*

(3.) *The questions arising when an intermediate carrier attempts to relieve itself of its liability as a common carrier after it has carried to the end of its line have been so frequently before the courts that the law upon that point is well settled and may be stated as follows:*

A connecting carrier does not change his responsibility as a common carrier to that of a warehouseman by storing goods while in transit. It must do some act indicating a clear purpose to make an end of its relation as a carrier. Without such act the storage will be considered as a mere accessory to the transportation and not as changing the nature of the bailment.

In *Railroad Company* v. *Manufacturing Co.*, 16 Wall., 318, the railroad company agreed to transport wool over its road to its depot in Detroit and there deliver to a succeeding carrier. The goods remained in the depot at Detroit and were there destroyed by fire. During all the times the wool was in the depot it was ready to be delivered for further transportation. The Court said:

> (It is the rule that) "it is the duty of the carrier, in the absence of any special contract, to carry safely to the end of his line and to deliver to the next carrier in the route beyond. * * *
>
> "Public policy, however, requires that the rule should be enforced, and will not allow the carrier to escape responsibility on storing the goods at the end of his route, without delivery or an attempt to deliver to the connecting carrier. If there be a necessity of storage it will

be considered a mere accessory to the transportation and not as changing the nature of the bailment. It is very clear that the simple deposit of the goods by the carrier in his depot, unaccompanied by any act indicating an intention to renounce the obligation of a carrier, will not change or modify even his liability" (p. 324).

A leading case is that of *Goold* v. *Chapin*, 20 N. Y., 259, and the authority of that case has been accepted and adopted in the State Courts of Illinois, Michigan, Wisconsin and other States:

In *Goold* v. *Chapin*, 20 N. Y., 259, the defendants were common carriers on the Hudson River, between New York and Albany, and received goods at New York to be transported to Albany, directed to the plaintiffs at Brockport, to the care of H. Fields & Co., Brockport, N. Y., per Atlantic Line, a line of canal boats running on the Erie Canal, and transporting merchandise from Albany to Brockport and Buffalo. The barge *Plymouth*, with the goods, arrived at Albany on the morning of the 14th August, 1846, and the next day the merchandise was discharged by the defendants from the barge to a float belonging to them lying in the Albany basin. The float was a vessel lying upon the water in the basin, and was used by the defendants as a place for storing and delivering goods to the canal-boats which were to carry them West. The boats came alongside of the float and received the goods. The float was prepared for the purpose of delivering the goods to the canal-boats with the necessary apparatus for lowering merchandise into the boats. The defendants made a practice of delivering goods from the barge to the float as soon as they could be discharged after arrival. The float was used exclusively for goods brought up the river in the defendants' barges or vessels. The defendants had at the time two warehouses at Albany, one on the dock and the other on the pier. On Tuesday, the 15th August, after the goods had been removed from the barge to the float,

an agent of the defendants gave notice to the agent of the Atlantic line, at its office on the dock at Albany, that there were goods on board the defendants' float for his line, and requested him to come and take them away, which notice and request was repeated on Wednesday and Thursday mornings. When notice was given on Thursday to the agent of the Atlantic line he replied that he was then taking some goods from the Eckford line of towboats on the river, and that as soon as he got them on he would have them shove up to the float and take on what goods they had for his line. In the afternoon of Thursday, August 17th, the float and the goods were consumed by fire. The fire did not originate from any want of care or skill on the part of the defendants, but from the want of care of some person or from accident and not by lightning. It was known to many merchants and forwarders, and the owners and agents of the Atlantic line, that the defendants' line discharged their up freight into their float and from thence into canal boats; but the *plaintiffs had no notice or knowledge* that they did so. The Atlantic line had no interest in the defendants' float. The goods were checked and an account taken of them as they were delivered from the float to the canal-boats, and the account rendered at the defendants' office. The defendants discharged their goods from the barge into the float, and then their hands in the boat delivered them to the hands in the canal-boats.

The Court said: "The cause and circumstances of the destruction (of the goods) were such as a common carrier is bound to answer for, but not such as suffice to charge a bailee for custody merely.

The important inquiry, therefore, is whether the goods at their destruction were in the custody of the defendants as carriers. The goods were delivered to the defendants in New York to be carried to Albany and there delivered to another carrier to be transported to Brockport, N. Y. (p. 262).

In *Van Santvoord* v. *St. John*, 6 Hill. 157, it was held that the first carrier's obligation was discharged when he had safely delivered

the goods to the next carrier, but that case did not present any question as to what would amount to such a delivery. The same remark is applicable to Ackley *v.* Kellogg, 8 Cow., 223. In both cases the second carrier had actually received the goods and was chargeable as carrier for their safety. It is found by the Referee in this case—and as we have not the evidence we must certainly assume the finding to be well warranted—that the Atlantic line did not receive the goods from the defendants within a reasonable time after notice was given of their arrival and a request that they should be taken away. Assuming that such notice if given to the owner at the end of the transit, and the unreasonable delay in taking the goods, would have put an end to the liability of the defendants as carriers, *yet, as I think, the cases and the nature of the transaction itself point to a distinction between that case and the case of consignee or second carrier.* If an undue refusal to receive by the owner at the end of the transit would justify the carrier in renouncing all further care over the goods, *it would not in the case of consignee or subsequent carrier where these relations were known to the first carrier.* * * * *Now, the goods in this case were transferred from the boat to the float to enable the defendants to complete their contract by making delivery.* The float was not a storehouse in the proper sense of that word; it was a part of the machinery to facilitate the business of carriage which the defendants adopted for their own convenience in performing their contracts to carry and deliver. *When the goods were unladen from the boat on which they were brought up the river and placed upon the float it was a step in the performance of the contract to deliver but not a delivery.* The performance was not by that act complete. *It was a mode of delivery which undoubtedly promoted the convenience of both sets of carriers, but it did not alter the responsibility of the first carrier who had not yet made delivery. There was no refusal to receive on the part of the second carrier, but there was unreasonable delay.* The defend-

ants, however, did not find this delay so unreasonable as to feel compelled to make a new disposition of the goods; they did not remove them from the exposure of a floating vessel from different parts of which goods were being delivered to different lines, and place them in store. *They indulged the other carriers in the delay as from the course of business was natural and suitable; and until some act was done on their part indicating a clear purpose to make an end of their relations as carriers as to these goods, I think their responsibility as such continued.* No owner can be supposed to have an agent to superintend each transhipment of his goods in the course of a long line of transportation; and if the responsibility to each carrier is not continued until delivery in fact to the next carrier, or at least until the first carrier, by some act clearly indicating his purpose, terminates his relations as carrier, we shall greatly diminish the security and convenience of those whose property is necessarily abandoned to others, with no safeguards save those which the rules of law afford. The stringency of the rules belonging to this species of bailment had its origin in public policy which long experience has approved as wise and salutary. Any other rule in respect to the duty of carriers at such points of transshipment when unmodified by custom than that above contained, would give rise and afford protection to the same class of mischiefs against which public policy has protected the community by the strict responsibility imposed upon carriers in other cases (pp. 262–265).

* * * * *

"*The defendants did not change their responsibility as common carriers and adopt that of warehousemen, by removing the goods from their barge to their float on their arrival at Albany. The change was their own act, without consultation with or notice to the plaintiffs or their agent; the goods were still subject to their control and there had been no actual delivery;* the float was in effect a substituted means of conveyance furnished by the defendants. By placing the goods on

that, the transit from the plaintiffs to their agent was not terminated. It was so decided by this Court in the case of *Miller* v. *The Steam Navigation Company*, 6 Seld., 431. In that case as in this, there had been a removal of the goods from a barge to a float, and Judge Jewett said, 'there was nothing to show an intention to store the goods, or anything to justify the defendant to do that, if such had been the intention. *The facts and circumstances show conclusively that the defendant, instead of being engaged in storing the goods, was placing them in a situation to deliver them according to its contract. The goods had not been placed entirely in a condition to deliver them when the accident happened. The defendant was at no time discharged of the responsibility which it had assumed as a common carrier.*'

There is undoubtedly an important difference between that case and the one which I am now considering. In that there had been no delay by the agent of the intended receiving line in furnishing the requisite means for the delivery of the goods; in this case there were repeated delays. *Notices that the goods were ready for delivery and calling for their reception, had been given to the agent of the Atlantic Line on three successive days.* No canal boat was sent to the float to receive the goods on either day, but on the third day the agent, on being served with the notice, 'replied that he was then taking some goods from the Eckford Line of towboats on the river, and that as soon as he got them on he would have them shove up to the float and take on what goods they had for his line.' *The goods were retained on the float until they were consumed by a fire on the afternoon of the same day.* The Referee finds that the Atlantic Line did not receive (he doubtless meant furnish the means to receive) the goods within a reasonable time after notice from the defendants of the arrival of the goods and after the defendants had requested the agent of that line to take them away. *The question is whether by reason of this delay the defendants were relieved from their responsibility as common carriers at the time of the fire. Of*

course there had been no delivery. The goods were still in possession of the defendants and subject to their control. If they had the power to change the character of their possession, when was it changed? *Not surely at the moment of serving the notice.* A reasonable time for taking possession of the goods by the Atlantic Line must undoubtedly have first elapsed. If there had been no delay there could have been no hiatus between the responsibilities of the two. When the responsibility of the defendants had terminated, that of the Atlantic Line would have commenced. *When goods are forwarded by connecting lines, the owners have a right to consider them under the safeguard of a constant responsibility until they reach their place of destination.* * * * To be sure, where there is no partnership between the proprietors of the several lines they should not be held responsible for the conduct of each other, nor can they be. In this case the delay of the Atlantic Line in receiving the goods did not impose upon the defendants the necessity of retaining possession of them beyond a reasonable time for their reception after service of the notice. They might have unquestionably deposited the goods in a warehouse, and thus have relieved themselves from further responsibility; or they might, as they did, elect to retain them in their own possession. As they chose to retain them it must have been in their original character as common carriers. *If they had intended to make a change, common fairness required that they should have given notice to the Atlantic Line to that effect. But that would have been insufficient, as the agent of that line would have no authority to relieve the defendants except by receiving the goods in behalf of his principals.* No great wrong can be done to common carriers in ordinary cases by holding them to their responsibilites as such until they part with the possession and control of the goods, either by delivering them to the consignees or depositing them in a warehouse where, as in this case, one is accessible. It may subject them to some inconvenience, but it is better to do that than to expose the

owners of goods, who are not usually present, so as to protect their own interests, to losses by reason of the misconduct or omissions of the managers of the different lines at their places of connection. The defendants retained the goods on their float probably from an expectation that they would soon be taken by the Atlantic Line, and possibly to save themselves the trouble of depositing them in a warehouse. *In doing so they consulted no one but acted at their own option* and as I conceive, at their own risk" (pp. 265-267).

If this case, universally regarded as a leading one on the subject, be rightly decided, it would seem to dispose of the contention of the Railway Company that its liability as carrier had ceased, and that its relation to the shippers was changed to that of warehouseman. In both cases the ownership, in the one case of the float, in the other of the wharf, was in the first carrier, the one depositing the goods for the purpose of delivering to the next carrier, and both places were used exclusively for the goods of the first carrier. The defendants in the Goold case had a warehouse in Albany and the Railway Company in the case at bar had one in New Orleans.

The defendants in the former case sent a notice to the connecting carriers that there were goods on the float for its line, and requested it to take them away, which notice and request was repeated twice.

Although notices of the arrival of part of the cotton were sent in the case at bar, the evidence does not disclose even a request to take this cotton away, much less is there any proof of delay on the part of the connecting carrier in respect to it. The railway company had contracted to bring to New Orleans a very large amount of cotton during the cotton season. The contract under which the cotton in this suit was brought provided for 20,000 bales to be delivered to Elder, Dempster & Co. during the months of October, November and December. Besides this contract, it had contracts with various

other steamship companies (p. 47). The result was a great accumulation of cotton at Westwego. Mr. Miller states that at the time of the fire there were about twenty thousand bales on the wharf and about two thousand bales in cars (p. 35) not unloaded because the wharf was full. The Railway Company, therefore, applied to the steamship agents, once about ten days before the fire, and again on the day of the fire, to assist them in relieving the congestion. But nothing was said as to particular lots of cotton.

There is no proof of a request to take away any of the cotton in this case, nor is there any question of reasonable time to perform the contract, involved. By the contract deliveries of 20,000 bales of cotton were to be made to the Elder, Dempster Line in October, November and December, 1894, and the Railway Company had entire liberty to ship by any other Steamship Line.

The evidence of Mr. Miller, pages 40 and 41, shows conclusively that during the whole week prior to the fire, that is, from a time prior to the first receipt by Elder, Dempster & Company, of any notification concerning any of the cotton in this suit, both of the berths at the wharf at Westwego were fully and continuously occupied by other ships loading there.

If the question of reasonable time entered into this case, as it does not, the proof shows that no matter how many ships Elder, Dempster & Company might have had ready to take this cotton in suit, by the act of the railway company it had no opportunity to take away this cotton, for there was no place at the dock at which to berth any ship to take away such cotton.

However unlike the case at bar is from the Goold case on the point of delay, the two cases are alike in that the arrangement for the delivery on the float in the Goold case, and on the wharf in the case at bar, was an arrangement unknown in both cases to

the shippers, and was one for the convenience of the carriers only.

The first carrier in both cases still had the custody of the goods, and there was no delivery until their employees actually delivered the goods into the hands of the connecting carrier.

The Court said in the Goold case that when the goods were unloaded and placed on the float it was a step in the performance of the *contract to deliver* and not a delivery, and that while the referee had found delay on the part of the connecting carrier, that the first carrier had nevertheless "indulged the other carriers in the delay as from the course of business was natural and suitable; and until some act was done on their part indicating a clear purpose to make an end of their relations as carriers as to these goods, their responsibility as such continued" (p. 264).

Except for the question of delay, is this not the situation in the case at bar? There has been no delay proved here, but even had there been the case would be precisely parallel with the Goold case and the language quoted above would apply here.

What was done by the Railway Company indicating a clear or any purpose to make an end of its relation as a carrier? What act of the Railway Company worked this change in its relations and duties to the shipper? Surely not the sending of the notice of arrival, for as the Court in the Goold case said that does not indicate such a purpose nor could any such notice affect the shipper's rights. What else? The Railway Company treated these bales of cotton precisely as other bales where a transfer of possession was had before the fire. The cotton was unloaded and placed on the wharf. Afterwards notice of arrival was sent. But no act was done by the Railway Company indicating any purpose to make an end of its relation as a carrier. Whether these particular goods were under the sheds or on the open wharf does not appear; all we know is that they were piled up on the wharf. And

the sheds were open. The wharf was under the absolute control of the Railway Company.

As in the Goold case: "The facts and circumstances show conclusively that the defendants, instead of being engaged in storing the goods, was placing them in a situation to deliver them according to its contract. The goods had not been placed entirely in a condition to deliver them when the accident happened" (p. 265).

Mr. Miller has testified in the case at bar that the cotton had to be moved again by the Railway Company, if necessary, before the cotton was actually pointed out and delivered to the steamship company, and therefore in unloading the cotton at Westwego the Railway Company was merely placing it in a situation to deliver it.

As Mr. Miller says (p. 48):

> "Q. What was the next step after you sent the transfer slip to the Steamship Company?
> A. Then it remained for the Steamship Company to take delivery of the cotton, send a steamer to Westwego and get it," &c.

It is important in this connection to consider the provision of the bills of lading that the cotton should be transported * * * from the port of New Orleans to the port of Liverpool, England, by the Elder, Dempster & Co. Steamship Line, *with the liberty to ship by any other steamship or steamship line* (pp. 92–94, 96–98). Why this reservation of liberty to ship by another ship or line? Is it not clear that by this provision the Elder, Dempster & Co. line does not become under the contract the connecting carrier until a delivery to it? The Railway Company reserves to itself the liberty of sending the cotton in suit from New Orleans by any other ship or line of ships. It had a contract with the Elder, Dempster line for a gross quantity of 20,000 bales, but there is no specification of, or designation of the cotton in suit, or of any other cotton. The Railway Company might at any time,

so far as the shipper or the contract is concerned, ship by any other line. Is this not a provision that would compel the Railway Company, in case of inability of the Elder, Dempster & Co. to take the cotton within a reasonable time after arrival, or should its ships be delayed in taking same, to send the cotton forward by another carrier? Certainly it throws the liability for unreasonable delay, if any, in sending the cotton forward from New Orleans upon the Railway Company.

The Circuit Court commented on this provision in the bill of lading reserving the liberty to forward by any other line than the Elder, Dempster & Co. as follows: "The very contingency of the failure or neglect or refusal of the second carrier to accept the goods from the first carrier is provided for, because it is left optional with the first carrier to send them forward by any other steamship line than the Elder, Dempster Steamship Company" (p. 89).

An attempt is made in the appellants' brief (p. 77. *et seq.*) to show that this liberty to ship by another line of steamships was a liberty confined to the Elder, Dempster Line. How can this be so? Such construction is directly opposed to the plain reading of the contract, and why should the Railway Company be deprived of this privilege in case of the refusal or inability of the Elder, Dempster Line to receive the cotton?

The authority of *Goold* vs. *Chapin* is followed in *Mills* vs. *The Michigan Central R.R. Co.* (45 N. Y., 622). Where it is said that the first carrier can only be discharged from its liability as a common carrier "by a delivery to the next carrier in the line of transportation, or by a notice to him that it was ready for delivery, and the lapse of a reasonable time for him to take it away, and in the event of his neglect so to do, the proper storage of the same, or by the doing of some act indicating a renunciation of the relations of carrier" (p. 625), citing *McDonald* vs. *West. Trans Co.*, 34 N. Y., 497, and *Goold* vs. *Chapin, supra.*

In this connection it was also said:

"But there needed not only notice to the carrier next in line of the arrival of the wheat, but a lapse of reasonable time for him to take it away, and in his neglect so to do *some disposition of it by the defendant*, indicating its intention no longer to be charged as carriers of it. What shall be a reasonable time is also to be determined by the circumstances of each case" (p. 626).

No act was done by the railway company in regard to this cotton after unloading it except the sending of the notices of its arrival. The cotton was allowed to remain on the dock where it was unloaded and placed *before* the sending of the notices. If there was delay by the steamship company, the railway company acquiesced in such delay.

Another leading case in New York is that of *Ladue* v. *Griffiths*, 25 N. Y., 364.

In this case the plaintiffs caused to be shipped at Detroit on board the steamboat *Hudson*, bound for Buffalo, to be transported East accompanied by a document in the form of a bill of lading, twenty-seven rolls of rough leather, of which they were the owners. The bill of lading specified the property, and stated the charges of the forwarding agent at Detroit, the amount of the Lake freight, and that it was to go from Buffalo to East Albany at certain rate of freight. It was addressed in the margin thus: "Leander Warner, Leicester, Mass., *via* Clappville Depot, to be delivered at East Albany, care J. M. Griffith & Co. (the defendants), Buffalo." It did not appear to be signed by the master or any one, except H. N. Strong, the forwarder at Detroit. The defendants' place of business was at Buffalo, where they were engaged in transportation on the Erie Canal, from that City to Troy and Albany. They were also forwarders and warehousemen, and they were accustomed to re-

ceive daily from the West property consigned to them in the same manner as the leather in question, and to ship the same to its destination at the East by their canal line or by other boats on the canal, whichever left first. On the arrival of the vessel from Detroit, on the first day of July, the leather was taken to defendants' storehouse and they made an endorsement on the bill of lading as follows: "Received and paid charges, John M. Griffith & Co." It remained in the storehouse until it was burned, as before mentioned. The fire took place July 4, 1851. The goods were shipped in the latter part of June. *The defendants insisted that as to this property they were storehouse-keepers and forwarders not common carriers.*

The Court said:

> "When the property in question was delivered on board the steamboat *Detroit*, marked and consigned to Leander Warner, Leicester, Massachusetts, it was so delivered for transportation to that place. It was known to the shipper, doubtless, that the steamboat *Hudson* could carry it no further than Buffalo, and it was therefore consigned to the care of the defendants at that place, who were carriers on the Erie Canal, to be carried and forwarded by them by canal in the regular course of business to Albany, and then to deliver the same at East Albany, at the railroad depot, to be further transported * * * to Leicester, Mass. The direction upon the bill of lading consigning the leather to the care of the defendants at Buffalo, made it the duty of the master of the steamboat to deliver it to them, and gave them the right to receive it from them, and thus secured to the defendants the profits incident to the transhipment, storage and carriage of the property until its transportation by canal was completed, and the property delivered at the railroad depot at East Albany.
>
> *No right or duty, in respect to such property, was conferred by the owner upon any person after its delivery on board the steamboat at Detroit, except that of carriage, and*

such as was incident to its transportation, until its delivery to the consignee at Leicester, Mass. The proprietors of the steamboat Hudson received it as carriers, and so did the defendants, subject, respectively, to all the duties and responsibilities of carriers.

These goods were placed by defendants in their warehouse for their own convenience, and for the purpose of being carried, and when goods are so stored the carrier is responsible for their safe keeping.

The owner of this property had no occasion to have the same placed in a warehouse at Buffalo for any purpose except such as pertained to its safe keeping during its transportation. It was not intended to be stored in warehouses at Buffalo for any purpose. It might doubtless have been transferred immediately from the steamboat to the Canal Company at Buffalo; *but if the defendants chose for any purpose to put it in their warehouse, it was to subserve their interests, and was at their own risks.* The claim of the defendants to escape responsibility for the loss of these goods upon the ground that they were simply warehousemen, and received them in that capacity, we think entirely untenable.

When a person is both carrier and warehouseman, it is well settled that the deposit of the goods in the warehouse is a mere accessory to the carriage, and not subject to any particular order of the owner, or if they are deposited for the purpose of being carried further, the responsibility of the party having them in charge is that of carrier. But when goods are deposited in a warehouse, subject to the further order of the owner, the case is otherwise. * * * *But this rule (as to warehousemen) cannot apply to any person having the charge or custody of the goods while they are in transitu. While the goods are in the process of transportation from the place of their receipt to the place of destination, it will never do in this country,* in my opinion, *to subject them in the hands of any carrier, or by his act or order, to the responsibilities of a mere warehouseman.* The carrier at common law is an insurer of the goods as against all accidents and perils, ex-

cept such as result from the act of God or a public enemy. A warehouseman is only responsible for ordinary care and is merely responsible for loss or injury resulting from his own default or negligence. * * * Goods are shipped and delivered to carriers by land at the seaboard or in the interior of the country, for transportation to different points, with a simple direction endorsed of the name of the owner or consignee and the place of delivery. *It would never do to hold that at any intermediate point such goods at the option of the carrier might be stored in a warehouse and the carrier relieved thereby of his proper responsibility.* If the defendants had owned the steamboat in which these goods were shipped at Detroit, no one would pretend, I think, that they could store them at Buffalo in a warehouse at the risk of the owner for their own convenience.

I conceive the responsibility of the defendants in respect to these goods, after they came in their possession, precisely the same, so far as related to their storage at Buffalo, as though they had been carried the whole distance from Detroit to Leicester, Mass. *Where there are several successive carriers who are engaged in the transportation of goods from the place of their reception to the place of their destination, the liability of each carrier will commence with the reception of the goods, and will continue until they are delivered according to the usage of the business of the next carrier in the line of the transit* (Van Santvoord *v.* St. John, 6 Hill., 158). *When a carrier deposits property in his own warehouse at some intermediate place in the course of his own route, or at the end of the route where it is his duty to deliver it to the owner, his duty as carrier is not completed, and he will remain liable as carrier for any loss for which common carriers are ordinarily responsible.* The defendants, I think, are responsible as carriers of the property in question upon the same principle; it was received and stored by them in their capacity or character as carriers as much as if they had received it at Detroit."

In the case at bar the wharves at Westwego had been recently constructed to facilitate deliveries to the steamships. The warehouses of the Railway Company were in the City of New Orleans (p. 32), and before the construction of the Westwego wharves it had made delivery to steamships by drays, and during the cotton season, when the fire occurred, cotton had been delivered in that way to Elder, Dempster & Co. at its wharf in New Orleans (pp. 83-84). The construction of the wharves shows that it was intended for a temporary place of deposit. The wharf was not even all covered, and the sheds were open. The uncovered portion was a mere platform. The railway employees unloaded the cotton and placed it anywhere they chose, under cover or not, as they pleased. They moved it about as they chose, had absolute control of it, and delivered it to the ship as ships arrive at the dock. The shipper did not know where his cotton was. It might be in warehouses at New Orleans, or on the open platform at Westwego, for all he knew. There is no proof that the shipper ever heard of Westwego at all, and it is not unreasonable to presume that he supposed, as he had the right to, that the delivery to the steamship company was made at New Orleans according to the terms of the contract. Under these circumstances is the claim of the Railway Company that it was a warehouseman as to the goods awaiting delivery at Westwego more than a desperate defense?

The cotton was placed on the wharf at Westwego for its own convenience. The deposit there was merely a part of the carriage and consequently did not change the liability of the Railway Company as a common carrier.

The principles of these New York cases have been approved in other States.

See *Illinois Central R. R. Co.* v. *Mitchell*, 68 Ill., 471.

In *Condon* v. *Marquette Railroad Co.*, 55 Mich., 2188, where Judge Cooley delivered the opinion of the Court, the defendant, a connecting carrier, had placed goods in its warehouse while in transit. From the point where the goods were so placed they were to be carried by another company. It was the mode of business for the receipt of goods to be entered at the warehouse upon the books of the defendant which were open to inspection to the next carrier, and which were regularly inspected by that company to ascertain what goods were to be taken by it. That company then would take the goods, load them in sleighs or vehicles at the warehouse and then receipt for them to the defendant. No notice was given to the next carrier that the goods had been placed in the warehouse. They simply remained in the warehouse until the fire took place.

The Court said that the question presented in this case had received the careful attention of the New York Court of Appeals in McDonald *v.* Western Railroad Corporation, 34 N. Y., 497.

The Court quoted from the opinion in that case, as to what amounts to a release of the carrier from its common law liability, and stated that it was there held that the deposit of goods in a warehouse while *in transitu* was a mere accessory to the carriage. The Court continued

> "This decision was approved as sound and followed as authority in Mills *v.* Michigan Cent. R. R. Co., 45 N. Y., 622, and it is undoubtedly the settled law of New York at this time (p. 221). * * * We think these cases lay down a rule which is just to the shippers of goods, and not unreasonably burdensome to carriers (p. 222). * * * The connecting carriers in this case appear to have established a custom of their own, under which actual delivery of the goods or notice to take them was dispensed with, and the one was to ascertain from the books of the other what goods were ready for reception and further carriage.

> This as between themselves was well enough while it worked well; but it was an arrangement to which the plaintiff was not a party, and the defendant could not by means of it relieve itself of any liability which duty to the plaintiff imposed."

As the Circuit Court of Appeals well says (p. 117):

> "There is no room for contention that the defendant had ceased to be a carrier and become a warehouseman. It had done no act evidencing its intention to renounce the one capacity and assume the other. Although it had requested the steamship line to remove the cotton, it had not specified any particular time within which compliance was insisted upon, and had not given notice that the cotton would be kept or stored at the risk of the steamship line upon failure to comply with the request. The request to come and remove it as soon as practicable was in effect one to remove it at the earliest convenience of the steamship line. There is nothing in the case to indicate that the defendant had not acquiesced in the delay which intervened between the request and the fire."

In addition to this it must be recollected that the alleged conversation between Pearsall, the Division Superintendent of the Texas and Pacific Railway Co. and Mr. Warriner, which is narrated on pages 80, 81, took place on Monday, November 12, and the fire occurred on that night (p. 80).

Also it must be remembered that for the week preceding the fire, the vessels of the Elder Dempster Steamship Company and other vessels had occupied all the dock room that there was at the Westwego wharf (pp. 40 and 41).

We submit that both on principle and authority the Railway Company did not relieve itself of liability as a common carrier.

Fourth Point.

The judgment below was right and should be affirmed.

TREADWELL CLEVELAND,
Of Counsel.